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IN THE

Supreme Court of the United States

October Term, 1964

No. 105

HARRY SCHACKMAN and HARRY GREENWALD,

Defendants and Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs and Respondents.

JURISDICTIONAL STATEMENT (RULE XIII(2)) RULES ON APPEAL.

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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

HARRY SCHACKMAN and HARRY GREENWALD,

Defendants and Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiffs and Respondents.

JURISDICTIONAL STATEMENT (RULE XIII(2)) RULES ON APPEAL.

(a) This is a joint appeal taken from the order of the Appellate Department of the Supreme Court[1], County of Los Angeles, reversing each defendant's conviction in part, and affirming the convictions in part (See Memorandum Opinion, Appendices A and B).

(b) The jurisdiction of this Court is invoked on the grounds *inter alia* that state statutes (*i.e.*, Los Angeles Municipal Code, Ordinance Section 39.04; Section 57.10.23(a) and Sec. 57.04.03)[2] have been sustained

[1]For the purpose of 28 U. S. C. §1257(2) the Appellate Department of the Superior Court is the "highest Court of the state" *Edwards v. California*, 314 U. S. 160, 86 L. Ed. 119, 62 S. C. 164.

[2]A Municipal Ordinance is, of course, a "State Statute" *Reinman v. Little Rock, Arkansas*, 237 U. S. 171, 35 S. C. 511, 59 L. Ed. 900.

against a claim of unconstitutionality under the Federal Constitution. Other questions raised also involve federal constitutional questions and invoke the jurisdiction of this Court (See *infra*).

(i) Defendants were separately charged but jointly tried for violation of the above enumerated "Nuisance" and "fire" ordinances.

(ii) Judgment of the Appellate Department of the Superior Court affirming the convictions was rendered December 4, 1963 (See Appendices A and B). A petition for rehearing and/or Certification to the District Court of Appeal of the State of California was denied on the 12th day of December, 1963. The Notice of Appeal was filed in the Appellate Department of the Superior Court on February 20, 1964. An extension of time to file this jurisdictional statement was granted by the Appellate Department of the Superior Court to and including May 20, 1964, by Judge Frank G. Swain on April 16, 1964.

(iii) Jurisdiction of this Court is conferred by Title 28, United States Codes, Section 1257 (2).

(iv) For case authority conferring jurisdiction upon this Court, see:

1. Appellate Jurisdiction: *New York Ex rel. Bryant v. Zimmerman*, 278 U. S. 63, 67, 49 Supreme Court 61, 73 Law. Ed. 184, 187; *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 60 Supreme Court 431, 84 Law. Ed. 596, 127 A. L. R. 821; *Lambert v. Calif.*, 355 U. S. 225, 78 Supreme Court 240, 2 Law. Ed. 2d 228.

2. Generally as to subsidiary questions involving constitutional issues: *Scott v. Donald*, 165 U. S. 58, 170 Supreme Court 265, 41 Law. Ed. 632.

3. Knowledge and Notice: *Lambert v. California, supra.*

4. Search and Seizure: *Mapp v. Ohio,* 367 U. S. 643, 81 Supreme Court 1684, 6 Law. Ed. 2d 1081; *Marcus v. Property Search Warrants,* 367 U. S. 717, 81 Supreme Court 1708, 6 Law. Ed. 2d 1127.

5. Cruel and Unusual Punishment: *Robinson v. Calif.,* 370 U. S. 660, 82 Supreme Court 1417, 8 Law. Ed. 2d 758.

6. "Due Process" and "Equal Protections": All cases above cited, and *Palko v. Connecticut,* 302 U. S. 319, 58 Supreme Court 149, 82 Law. Ed. 288.

(v) Section 39.04 the Los Angeles Municipal Code, is found in Article IX of Chapter 3 of that Code and reads as follows:

> "No person owning, leasing, acting as agent for, or occupying, or having charge of any premises shall fail, refuse or neglect to keep such premises in a clean and wholesome condition, or permit to be or remain upon such premises, any accumulation of manure, garbage, offal, rubbish, stagnant water or filthy or offensive matter of any kind, or any material which creates offensive or obnoxious odors or promotes fly-breeding".

Section 57.10.23 (a), the Los Angeles Municipal Code is a part of Chapter V, Division 10 of that Code, and reads:

> "Every person owning or managing any building where people live, work or gather other than a dwelling, shall provide exit and directional signs as hereinafter specified . . . (a) unless otherwise clearly and unmistakenly indicated as an exit,

every exit door serving as a way of egress, placed over or adjacent thereto a sign bearing the word 'EXIT' in letters not less than 5 inches high. . . ."

Section 57.04.03 was at that time a part of Division 4 of the aforesaid Chapter (it was repealed July 6, 1963). It read:

"No person, without a valid Permit then in effect so to do: . . . [shall] establish, operate, maintain a theatre, motion picture theatre, and place of assemblage".

(c) The questions presented on appeal to this Court as presented in the Notice of Appeal are that Section 3904 of the Municipal Code is so vague and ambiguous as to deny due process of law in violation of Amendment XIV of the United States Constitution. Sections 57.10.23(a) and 57.04.03 are claimed to be invalid under Amendment Fourteenth of the United States Constitution in that they fail to include any "intent" or "notice" provisions, and further that these "fire ordinances" was shown by the evidence to be passed without notice of the requirements being given to the appellants who previous to the passage of said ordinances were licensed and regulated by the laws of the City of Los Angeles.

Further questions on appeal presented are that there was a mass arrest and search and seizure of evidence presented at the trial without warrant and this was a violation of the Fourteenth Amendment to the United States Constitution.

Cruel and unusual punishments were inflicted upon the appellants in violation of Amendments 8 and 14 of the United States Constitution, or in the alternative.

and conversely, the appellants were denied indirectly their right to a jury trial and due process of law, in violation of Amendments 6 and 14 in that by choosing to have a trial by jury they faced increased punishment over those who chose to enter a plea of "guilty" to the same offenses. It is further submitted in this connection that the action of the respondent, the State of California, through its agents, in refusing to waive a jury trial on its face and under the circumstances herein, was so harsh and oppressive as to deny appellants a fair trial and equal protections of the law in violation of the Fourteenth Amendment.

Final question presented to this Court is whether or not the procedures of the State of California which permit the trying of several different and unrelated offenses is so deficient on its face where it is applied in the instant case as to deprive the appellants of a fair trial and due process of law and/or their right to trial by jury in violation of Amendments VI and XIV.

Statement of the Case.

On September 30, 1961 appellant Schackman owned and operated an "arcade" on Main Street in the City of Los Angeles. Greenwald was his employee. Shackman had been operating the arcade for approximately two years prior to that date, under a regulatory Permit from the City of Los Angeles. Part of this operation was the showing of nude movies, commonly known as "Peep Shows." Early in 1961, the legislature of the State of California had passed a new "obscenity" law in conformity with the opinions of this Court. This law was to become effective on September 15, 1961. Prior to September 15, 1961, a meeting was held with the city officials including the City Attorney, Police De-

partment, and the Police Commission in which it was agreed that once the law became effective that the pictures shown could be deemed "obscene" under the new law, even though they were not so deemed under the old California law. In accordance with the plan formulated by the City Attorney's office, and the Police Department, the mass arrest and raid was made in the 19 arcades, including the appellant's. "25 persons were arrested at the time and complaints . . . . filed against all owners of record. . . ." [Ex. 27, p. 17] The events at appellant's premises are typical of the events at each and every other arcade. See testimony of L.A.P.D. officers McGann, R. T. 502, and Robert L. Smith, R. T. 370] These officers went into the appellant's arcade, established that there was "knowledge" of the contents of the films, and then proceeded to open up every machine booth forcibly, remove 25 reels more or less from these particular booths and systematically went through every door in the establishment, including a door leading to an adjoining barber-shop and into a store-room in the basement and confiscated over 600 reels of film from the establishment. The public were excluded from appellant's place of business. Squads of policemen, investigators, Firemen, photographers and the like descended upon Main Street like locusts and started to procure the evidence which they had already determined that they were doing to obtain. This amazing spectacle took place on one of the busiest thoroughfares in one of the largest cities in the United States. The businesses that were open to the public were forcibly closed. Members of the public were herded together and interrogated by the police officers. Some of the members of the public were permitted to go home; some were arrested.

Appellants thereafter were separately charged in identical complaints with violations of the state "obscenity" law and the Municipal ordinances referred to herein. Demurrers to the complaints were filed alleging a misjoinder of these offenses and denial of due process of law. At the time of trial, a motion for severance was made to sever the obscenity count from the Municipal ordinance on the grounds that such a joint trial could be prejudicial, a denial of due process and equal protections of the law, and in violation of the 14th amendment to the United States Constitution. The Demurrers were obviously overruled and the motions for severance denied. (See Docket entries of Clerk).

Prior to the commencement of the trial by jury, appellants attempted to waive trial by jury but were unable to accomplish since the prosecution demanded the jury trial. The appellants were thus subjected to the costs of the jury trial which extended over a period of approximately six weeks. The principle questions were questions of law. Also, prior to the commencement of the jury trial, the Court was requested to conduct a hearing in light of the contention of the defendants that all of the evidence obtained was obtained in violation of Amendment XIV to the Constitution. Because the Court did not know of any procedure by which this could be done, the request was denied with the result that the objections to the reception of the evidence were heard on "voir dire" outside of the presence of the jury during the course of the trial and in fact occupied about 75% of the trial time. Consistent and repeated objections to the admission of the evidence were on the basis of unlawful search and seizure were denied [See Rep. Tr. pp. 2-16; the Clerk's Docket, the

Appellants' Trial Briefs and Supplementary Trial Brief]. At page 756 of the Reporter's Transcript, the Court stated "the defendant's motion to suppress [the illegally received evidence] is denied." [See Also pp. 1048-1051 where the motions are renewed and deneid, again at p. 823].

Connection with the issue of a fair trial, equal protections and due process of law and cruel and unusual punishment was testimony of Burton Marks [R. T. 975]:

"I told Mr. Lindy that I discussed this situation with Larry Booth, the City Attorney, who was handling all of the arcade matters. Mr. Booth had informed me that of the approximate 19 arcades and 25 persons that had been arrested on September 30, 1961, the owners entered a plea of guilty in Division 20—this is the master calendar court —the City Attorney would then move to dismiss the case against the employees. The stipulation is that they plead guilty to Count One and Two of the complaint, the remaining counts would be dismissed and so would the case against the employees, and that it had been the custom in Division 20 to be a fine at about the most of $200, perhaps less, depending upon the circumstances.

"The City—I also told Mr. Lindy that Mr. Booth had informed me that if a plea of guilty was not entered, that the City Attorney's office would demand a jury trial and that they would not dismiss the case against any of the employees.

"I also informed Mr. Lindy that Mr. Booth had informed me that there had been two, out of approximately 17 cases, that had already come up,

that had not pleaded guilty, of these two they had gone to jury trial, they had been long jury trials, there had been convictions in both cases, and that the penalty imposed by the courts in the cases which had gone to trial had been substantially greater. And I believe that I told him that Mr. Booth had said there had been a jail sentence imposed."

Both of the appellants herein after the jury trial had six-month sentences imposed upon them for violation of the "obscenity" statute and for violation of count 2 the "nuisance" ordinance; to run concurrent. Excessive fines were imposed for the remaining counts on Mr. Schackman. Most of the testimony and argument in this trial revolved around the question of the validity and interpretation of the obscenity statute. The Appellate Department of the Superior Court although reversing the obscenity convictions (see Appendices A and B) failed and refused to reverse the other convictions. These convictions were inextricably tied in with the obscenity conviction and the evidence on the obscenity charges was such as to prejudice the jury with respect to the other counts. This argument was presented and rejected on motion before trial, at the time of the Appellate hearing and on Petition for a Rehearing.

Question of cruel and unusual punishment was raised in the appellant's opening brief (App. Op. Br. designation of error No. 5 "Cruel and Unusual Punishment was Inflicted"), and by Motions to the Appellate Department to hear additional evidence upon the question of the punishment imposed and the activities of the prosecuting officials. The motion to hear the additional evidence on the question of cruel and unusual punish-

ment was denied. (See Record of Appellate Court transmitted to this Court.)

The constitutionality of the "nuisance" ordinances was raised at trial by motion to dismiss and supported by trial briefs. The original trial brief alleged that the ordinances were ". . . unconstitutional and vague in violation of the due process clause of the California Constitution and Amendments 5 and 14 to the United States Constitution, in that they are so vague and indefinite that a person of ordinary and common intelligence could not know what was prohibited nor [were] any standard set forth by the sections of the Municipal Code to which they relate . . .".

The validity of these particular ordinances were also challenged on the grounds that they were "pre-empted by state law dealing generally with the abatement of nuisance in the state and which required "notice".[3]

In the Appellant's Supplementary Trial Brief it was stated

> "It is obvious by a perusal of the nuisance statutes in the Penal Code . . . that the Legislature intended to embrace a scheme which prevented anything injurious to health, indecent or offensive to the senses . . . to be prohibited. That this was intended to apply to cities as emphasized in Section 373 (a) where it is made the duty of the City Attorney of any city to prosecute under this section and also to give some sort of

[3]California Penal Code §373a provides, in part that "every person who maintains . . . a public nuisance . . . after reasonable notice, in writing, from a Health Officer or District Attorney or City Attorney . . . is guilty of a misdemeanor . . .". This Section supplies the requirement of "notice" the absence of which renders the Municipal Ordinance in question invalid.

written notice that the nuisance was in existence. Of course, the evidence will show that the City Attorney's Office and the Police Department of the City of Los Angeles had extensive and continuing notice of the 'nuisance' and no such notice was given to any of the Arcade owners, including the defendants.

"Counts III and IV dealing with clean and sanitary places of public assemblage seem to deal with the same subject matter. However, in those cases, the words 'good, clean and sanitary' are so vague and ambiguous that they are unconstitutional on the face. As a part of substantive due process of law, a criminal statute must be so definite and certain that it gives a fair warning to inform a person of ordinary or average intelligence of what acts it declares it to be prohibited and punishable. In other words, it must not be so phrased that a party might commit the offense not knowing that his act is included in the statutory prohibition . . ." (citing *People v. Boljat*, 36 Cal. App. 2d 644, 98 P. 2d 513 and *In re Peppers*, 189 Cal. 682, 209 Pac. 896).

On appeal appellants designated as "Error number 3" the denial of defendants' motion to dismiss Counts II, III and IV on the grounds of vagueness.

The constitutionality of the Fire Ordinances was raised on trial by similar motion. The basis for these objections was founded on the testimony of the prosecution witnesses on cross-examination. Captain Buxton of the Los Angeles Fire Department who noted the

Fire Ordinance violation, was questioned as follows [R. T. 685]:

> "Now, it is a fact, isn't it, Captain, that in order to obtain a license or permit to operate a place of public assemblage that the person must first acquire a Fire Department clearance or permit?" . . . "The witness: He must obtain a Fire Department clearance before the license is issued." "Q. by Mr. Marks: All right. Now, would the Fire Department issue a clearance if the regulations of the Fire Department of the Municipal Ordinances are not met?" "Answer. No."

One of the City Clerks testified [R. T. 849] as follows:

> "Q. So sometime before . . . . between 1958 and 1961 the procedure changed in the Clerk's office so that a person would have to obtain a fire permit in order to go into business? . . . A. That is correct." . . . "The ordinances became effective January 1st of 1960 and the first applications were taken, oh, about the third week of January . . . ." "Q. When these ordinances became effective in January of 1960, did your office then send any notice to licensees or permittees that fire permits were required? . . . A. No sir."

A requested instruction by the defendant which was not given read as follows:

> "The law does not contemplate punishing a person for failure to do an act which a person could not reasonably have anticipated that he was required to do. Thus, in Count VII, if you find that it was not reasonable to suppose that the de-

fendants could or should have known of the requirement that a fire permit be obtained under all the circumstances, they cannot be convicted of the charge alleged in Count VII."

On appeal the specification of error was raised as follows:

> "As to Count VII, particularly, and also Counts V and VI, defendant SCHACKMAN was not notified of the fact that a fire permit was required and this lack of knowledge is fatal to the Peoples' case (*Lambert v. California*, 355 U.S. 225, 2 L Ed 228, 78 S.C. 240)" (App. Op. Br. at p. 8).

It might be noted that the evidence of the "nuisance" dealt with the fact that after the mass arrest and raid police officers went into the defendants' establishment and by the use of ultra violet lamps were able to scrape off the walls of some of the projection booths "semen" stains. The presence of these semen stains or the fact that they were semens could not be detected without the use of highly scientific instruments and technical scientific analysis. Of course it was contended that this evidence was also a "fruit of the poisonous tree", *i.e.*, the evidence unlawfully seized by the mass raid and arrest. On appeal, error number 13 specified that "the evidence presented was unlawfully seized in violation of Article I, §19, California Constitution and U.S. Constitution Amendment XIV and therefore, inadmissible."

As heretofore stated the error of misjoinder of the offenses and the prejudicial effect thereof was presented to the trial court by demurrer and by motion to sever. On appeal, the overruling of the demurrer and

the denial of motion [for severance] was designated as error number 1. On petition for rehearing, after the obscenity Count had been reversed, the appellants pointed out to the Court

> "This abuse of administration of justice [prejudicial misjoinder] should not be countenanced by this Court. Furthermore, it is a question of substantial importance relating to the defendants that the court should not stand silent in the face of an accusation on appeal that the misjoinder was erroneous and not only erroneous, but prejudicial. The petition for rehearing then continues, citing *McElroy v. U.S.*, 164 U.S. 76, 17 S.C. 31, 33, 41 L Ed 355, for the proposition that 'The order of consolidation was not authorized by statute, and did not rest in mere discretion.' And that 'it would seem to us that in the very nature of things the consolidation of such separate unconnected charges for trial could not help but be prejudicial to either or both defendants.
>
> "The fact that *McElroy* talks about felonies only is irrelevant in the light of *Gideon v. Wainwright*, 9 L ed 2d 799, giving as a matter of 14th Amendment protections the right to counsel 'in all criminal prosecutions' and, . . .
>
> "When a defendant has been denied any essential element of a fair trial or due process even the broad saving provisions of harmless error provision of the State Constitution cannot remedy the vice and the judgment cannot stand. . . ."

In conclusion, appellants would point out that this is one of the most unusual cases to come before a State Court in California. It arises out of an over-zealous

endeavour of local officials to close down lawful businesses by any means and regardless of the cost. Commencing with an illegal raid and procuring of evidence. the prosecution was only stopped in this one instance from obtaining pleas of guilty and/or obtaining convictions on the "obscenity" charge by the dogged persistence of the appellants herein. Concerted effort was made by the prosecution to obtain pleas of guilty by threats of greater punishment and in fact they were able to manipulate the judges secured so that the appellants herein, by attempting to secure a trial indeed suffered the increased punishment for violation of minor offenses. Finally, the convictions were obtained not only with illegally seized evidence, but under unconstitutional ordinances. It is respectfully submitted that the Federal questions presented at trial on appeal and herein are substantial, particularly within the areas of 14th Amendment protections against unlawful search and seizures (*Mapp v. Ohio, supra*) and with relation to the extent of the constitutional requirements of "notice" and "knowledge" and under the standards laid down in the case of *Lambert v. California, supra*. The questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution.

Respectfully submitted,

BURTON MARKS,
Attorney for Appellants.

APPENDIX A.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Superior Court No. CR A 5272, Trial Court No. 15074.

People of the State of California, Plaintiff and Respondent, vs. Harry Schackman, et al, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Byron J. Walters, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment as to Count I made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed; the judgment is affirmed as to Counts II, V, VI and VII; the appeal is dismissed as to counts III and IV; the appeal from order denying new trial is dismissed.

MEMO.

With respect to Count I, alleged exhibition of obscene matter in violation of section 311.2 Penal Code, we are bound by the holding in *Zeitlin v. Arnebergh* (1963) 59 A.C. 930 that only "hard-core pornography" is prohibited. Having made the required independent

examination of the evidence we find that the material exhibited was not hard-core pornography within the holding of that case. With respect to Counts III and IV see section 654 Penal Code.

Dated: Dec. 4, 1963.

BY THE COURT.
HULS
Acting Presiding Judge.
SMITH
Judge.
KINCAID
Judge.

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19..... and now remaining of record in this Court.

WITNESS my hand and seal of the Court, affixed this ..... day of ....., 19 .....

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles.

By ..... Deputy.

APPENDIX B.

In the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

Superior Court No. CB A 5271, Trial Court No. 150398.

People of the State of California, Plaintiff and Respondent, vs. Harry Greenwald, Defendant and Appellant.

On Appeal from the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Byron J. Walters, Judge.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is Ordered and Adjudged that the judgment as to Count I made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same is hereby reversed; the judgment as to Count II is affirmed. The appeal from order denying new trial is dismissed.

MEMO.

With respect to Count I, alleged exhibition of obscene matter in violation of section 311.2 Penal Code, we are bound by the holding in *Zeitlin v. Arnebergh* (1963) 59 A.C. 930 that only "hard-core pornography" is prohibited. Having made the required independent examination of the evidence we find that the

material exhibited was not hard-core pornography within the holding of that case.

Dated: Dec. 4, 1963.

BY THE COURT:
HULS
Judge.
SMITH
Acting Presiding Judge.
KINCAID
Judge.

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles, do hereby certify that the foregoing is a true copy of the ..... original judgment entered by said Court in the above entitled cause on the ..... day of ....., 19....., and now remaining of record in this Court.

WITNESS my hand and seal of the Court, affixed this ..... day of ....., 19.....

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles.

By ..... Deputy.

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HARRY SCHACKMAN and HARRY GREENWALD,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

HARRY SCHACKMAN and HARRY GREENWALD,

Appellants,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Appellee.

On Appeal From the Appellate Department of the Superior Court of the State of California for the County of Los Angeles.

MOTION TO AFFIRM THE ORDER AND/OR DISMISS THIS APPEAL.

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the judgments of the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles, rendered and entered on December 4, 1963, be affirmed, or that the appeals taken therefrom to this court be dismissed on the ground that the federal questions are so unsubstantial as to not warrant further argument, and that the said judgments appealed from rest upon an adequate non-federal basis.

Statement.

These are direct appeals from judgments entered December 4, 1963, by the Appellate Department of the Superior Court of the State of California, for the County of Los Angeles.

Briefly stated, appellants were charged in separate verified seven-count complaints with violation of

1. Section 311.2 of the California Penal Code (Appendix A)—displaying obscene material.
2. Section 39.04 of the Municipal Code of the City of Los Angeles (Appendix B)—neglecting to keep premises in a clean and wholesome condition . . . and permitting filthy and offensive matter to remain and accumulate.
3. Section 39.50 (a) of the Municipal Code of the City of Los Angeles (Appendix C)—conducting and maintaining a place of public amusement and public assemblage other than in a good, clean, sanitary condition, etc.
4. Section 39.50(b) of the Municipal Code of the City of Los Angeles (Appendix D)—conducting a moving picture show and place of public amusement and public assemblage without keeping clean and in good repair all floor coverings, chairs, equipment, etc.
5. Section 57.10.02 of the Municipal Code of the City of Los Angeles (Appendix E)—maintain a door in a passageway required as a means of egress from a portion of the building which could not be opened from the inside within 30 seconds without use of a key, tool, etc.

6. Section 57.10.23(a) of the Municipal Code of the City of Los Angeles (Appendix F)—owning and managing a building where people work or gather other than a dwelling, without providing a door serving as a way of egress with a sign bearing the word "Exit."

7. Section 57.04.03 of the Municipal Code of the City of Los Angeles (Appendix G)—operating a motion picture theatre and place of assemblage without a permit

The causes were consolidated for trial and the jury returned verdicts of guilty as to appellants on all counts.

Appellant Schackman was sentenced to 180 days on Count I, 180 days on Court II, to run consecutively with Count I. The trial court declined to sentence on Counts III and IV and imposed fines on Counts V, VI and VII (pp. 17 and 18 of docket).

Appellant Greenwald was sentenced to 180 days on Count I, 180 days on Count II to run concurrently. As to Counts III through VII his motion for new trial was granted and such counts were dismissed (p. 14 of docket).

The appeals to the Appellate Department of the Superior Court resulted in the reversal of Count I as to each appellant on the ground that the material purportedly obscene did not constitute *hard core pornography under Zeitlin v. Arnebergh* (1963), 59 Cal. 901, 383 P. 2d 152, decided subsequent to the trial of these actions.

Thus, the only statutes before this court are those insuring that places of public amusement and as-

semblage be maintained wiith due regard to the *health* and *safety* of the *public*.

The evidence presented at the trial disclosed that appellant Schackman owned and operated an "arcade" on Main Street in the City of Los Angeles and that appellant Greenwald was his employee. Such arcade was open to the public and featured the showing of motion pictures of nude girls on small individual coin-operated projection machines located in some 24 separate booths. [R. T. 424-438].

On September 30, 1961, Officer Michael F. McGann of the Los Angeles Police Department entered and went to the rear of the arcade, which was open to the public [R. T. 432-433]. and there viewed the moving pictures on four of the machines by placing money in the coin slots [R. T. 433-437]. He determined that the pictures were obscene within the meaning of Sections 311 and 311.2 of the Penal Code of the State of California (Appendix A).

The officer then conversed with appellant Greenwald, who revealed he had knowledge of the character of the pictures being shown on the machines [R. T. 432-436].

Soon thereafter appellant Greenwald was arrested for violation of Section 311.2 of the California Penal Code (Appendix A), displaying obscene material. The films were taken into custody and an investigation of the premises ensued.

Officer McGann testified that he could see the condition of the walls and floors in the rear of the arcade [R. T. 462-464], and that there was a strong smell of urine [R. T. 457-461]. During the trial there was an abundance of testimony as to streaks and stains on the walls of the booths and on the machines and floors that were easily visible [R. T. 462, 494-497, 770-774].

Sgt. Robert E. Kearney, a member of the Los Angeles Police Department assigned to the Scientific Investigation Division testified that in his expert opinion from scientific tests performed at the arcade on the night in question and later in the police laboratory, the streaks and stains about the premises were human semen [R. T. 770-774]. He further testified that each booth had approximately 50 to 75 separate semen stains on the average [R. T. 771]; that laboratory tests of scrapings taken from the arcade revealed semen [R. T. 771], and that a wet rubber prophylactic containing semen was found on the floor of the arcade [R. T. 768-770].

The investigation by Captain Buxton from the Public Assemblage Division of the Los Angeles Fire Department revealed that the exit door from the premises was obstructed and locked by means of a padlock and hasp and that there was no sign whatever indicating *exit* at or near the exit door [R. T. 674-676]. Also, there was no permit issued to the premises under Section 57.04.03 of the Los Angeles Municipal Code [R. T. 671-672].

Appellants appear to present five questions on appeal:

1. Whether Section 39.04 of the Los Angeles Municipal Code is unconstitutionally vague or indefinite.
2. Whether the Fourteenth Amendment to the Constitution of the United States requires that operators of places of public assemblage be notified of the existence of fire ordinances governing the conduct of such businesses.
3. Whether evidence introduced to support the conviction of the counts now before this court was obtained by illegal search and seizure.
4. Whether the sentence imposed constituted cruel or unusual punishment.
5. Whether plaintiff's exercise of its right under the California Constitution to a jury trial denied appellants equal protection of the law under the Fourteenth Amendment to the Constitution of the United States.
6. Whether the joinder of several offenses in different counts of the same complaint constitutes a denial of due process of law or right to trial by jury under the Sixth and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT.

I.

Section 39.04 of the Los Angeles Municipal Code Is Not Unconstitutionally Vague or Indefinite.

Section 39.04 of the Los Angeles Municipal Code provides:

> "No person owning, leasing, acting as agent for, or occupying, or having charge of any premises shall fail, refuse or neglect to keep such premises in a clean and wholesome condition, or permit to be or remain upon such premises, any accumulation of manure, garbage, offal, rubbish, stagnant water or filthy or offensive matter of any kind, or any material which creates offensive or obnoxious odors or promotes fly breeding."

It is apparently appellants' contention that such words as "clean" and "wholesome" are vague or indefinite. However, they are words of common meaning.

In *People v. Balmer* (1961), 196 Cal. App. 2d Supp. 874, 879, 17 Cal. Rptr. 612, it was held:

> "The words clean, sanitary and good repair are not so vague or indefinite as to make the Administrative Code Sections unconstitutional."

This court has held sufficiently definite such terms as "loud and raucous noises" (*Kovacs v. Cooper*, 336 U. S. 77), "depravity, criminality, unchastity" (*Beauharnais v. Illinois*, 343 U. S. 250), "offensive, derisive or annoying words" (*Chaplinsky v. New Hampshire*, 315 U. S. 568).

As was stated in *Roth v. United States, Alberts v. California,* 354 U. S. 476, 491:

> ". . . [T]he Constitution does not require impossible standards; all that is required is that the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. . . ."

Certainly the words here in question meet the test.

II.

The Fourteenth Amendment to the Constitution of the United States Does Not Require That an Operator of a Business Have Actual Notice of the Fire Ordinances Regulating the Conduct of His Business.

Appellants contend they were entitled to notice of the existence of the fire ordinances manifestly enacted for the protection of the public invited to come upon the appellants' premises. However, neither ever took the stand to testify.

It is the general rule that ignorance of the law is no excuse, and, as stated in *United States v. Balin*, 258 U. S. 250, 252:

> ". . . in the prohibition or punishment of particular acts, the state may, in the maintenance of a public policy, provide 'that he who shall do them shall do them at his peril, and will not be heard to plead in defense good faith or ignorance.' Many instances of this are to be found in regulatory measures in the exercise of what is called the police power, where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crimes. . . ."

The subject matter of the legislation herein question bears little resemblance to the convict registration ordinance under consideration in *Lambert v. California*, 355 U. S. 225. There, the conduct involved was wholly passive—mere failure to register, and this court in such case emphasized that:

> "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."

Surely the protection of members of the public from the peril of fire and filth in a place of business inviting their entry falls within this latitude.

III.

This Case Does Not Involye in Any Way Convictions Based Upon Illegally Obtained Evidence.

The premises purportedly searched were premises *open to the public* [R. T. 432-433].

California courts have held that "Merely to observe what is perfectly apparent to any member of the public who might happen to be on the premises is not a search" (*People v. Norton* (1962), 209 Cal. App. 2d 173, 176-177, 25 Cal. Rptr. 676), and ". . . Merely to observe what is perfectly apparent to anyone who might be within the store is not a search" (*People v. Roberts* (1960), 182 Cal. App. 2d 431, 437, 6 Cal. Rptr. 161).

In *People v. West* (1956), 144 Cal. App. 2d 214, 220, 300 P. 2d 729, it was held that the mere looking at that which is open to view is not a search." The *West* case was cited in *Ker v. California*, 374 U. S. 23, 43, as authority for the ruling that seeing what is before the observer in full view is not a search.

Of course the locked exit door, the lack of the required exit sign, and the semen stains were in full view.

IV.

The Sentences Imposed Did Not Constitute Cruel and Unusual Punishment.

Section 11.00(m) of the Los Angeles Municipal Code (Appendix H) provides, that any person violating any of the provisions or failing to comply with any of the requirements of such code shall be guilty of a misdemeanor, and unless provision is otherwise made, shall be punishable by a fine of not more than $500, or by imprisonment in the City Jail for a period of not more than six months, or by both such fine and imprisonment.

All of the sentences imposed in this case were within the maximum provided by such city ordinance.

In *In re Polizzotto* (1922), 188 Cal. 410, 412, 205 Pac. 676, the court, in commenting on a sentence under a county ordinance, stated:

> "It has often been held that a punishment by a fine of $500, or imprisonment for six months, or both, for an ordinary misdemeanor, is neither excessive, cruel, nor unusual."

In *Weems v. United States* (1909), 217 U. S. 349, 369, this court stated that there would appear to be nothing excessive, or cruel, or unusual in a fine of $50 and imprisonment at hard labor in a house of correction for three months imposed for keeping and maintaining, without a license, a tenement for the illegal sale and illegal keeping of intoxicating liquors.

The punishment imposed for violations of the provisions of the Los Angeles Municipal Code is the same as that imposed for general misdemeanor violations un-

der Section 19 of the Penal Code of the State of California (Appendix I).

Robinson v. California, 370 U. S. 660, cited by appellants as supporting their argument that the Los Angeles ordinances inflict cruel and unusual punishment, was not critical of the length of time in jail that may constitute the punishment, but went rather to the point that incarceration in jail is not appropriate punishment for the status of an illness, addiction to narcotics.

V.

Appellants' Subjection to Jury Trial Did Not Deny Them Equal Protection of the Laws Under the Fourteenth Amendment to the Constitution of the United States.

Article 1, Section 7 of the Constitution of the State of California provides:

> "The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties, signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of twelve, or of any number less than twelve upon which the parties may agree in open court."

In *People v. Spencer* (1959), 170 Cal. App. 2d 145, 149, 338 P. 2d 484, it was held that "It is necessary for the waiver of trial by jury to become effectual, for the defendant, his counsel and the District Attorney, to all consent."

In the instant case the prosecution merely did not waive its right to trial by jury, the result being a jury trial pursuant to the provisions of the California Constitution.

While appellants contend that this trial by jury denied them equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, they cite no applicable authority to support such a proposition.

VI.

Various Offenses Were Properly Joined in the Same Complaints.

Section 954 of the Penal Code of the State of California provides:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups

and each of said groups tried separately. An acquittal of one or more counts shall not be deemed an acquittal of any other count."

In *People v. McKenna* (1953), 116 Cal. App. 2d 207, 210, 285 P. 2d 452, it was held:

> ". . . one may be convicted of more than one offense arising out of a single transaction if each is stated in a separate count and when the offenses differ in their necessary elements, the one is not included in any other."

In the complaints at hand, all of the counts were connected together in their commission through the transaction of operating the arcade.

As stated by this court in *Ashe v. United States ex rel. Valotta*, 270 U. S. 424, 425, it cannot be doubted that a state can authorize the whole story to be brought before a jury at once, even though two indictments were involved, without denying due process of law.

Conclusion.

Appellee urges, therefore, that the appellants present no substantial question for the decision of this court; that the judgments sought to be appealed from should be affirmed or the appeals dismissed.

Respectfully submitted,

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APPENDIX A.

Sections 311 and 311.2, California Penal Code.

§311. [Definitions.] As used in this chapter:

(a) "Obscene" means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance.

(b) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording, transcription or mechanical, chemical or electrical reproduction or any other articles, equipment, machines or materials.

(c) "Person" means any individual, partnership, firm, association, corporation, or other legal entity.

(d) "Distribute" means to transfer possession of, whether with or without consideration.

(e) "Knowingly" means having knowledge that the matter is obscene.

§311.2. [Sale or Distribution, etc., of obscene matter: Penalty.] Every person who knowingly: Sends or causes to be sent, or brings or causes to be brought, into this State for sale or distribution, or in this State prepares, publishes, prints, exhibits, distributes, or offers to distribute, or has in his possession with intent to distribute or to exhibit or offer to distribute, any obscene matter is guilty of a misdemeanor. (Stats. 1961, c. 2147, pp. 4427-4428, sec. 5.)

APPENDIX B.

Section 39.04, Municipal Code of the City of Los Angeles.

Sec. 39.04. Premises—Keeping Clean:

No person owning, leasing, acting as agent for, or occupying, or having charge of any premises shall fail, refuse or neglect to keep such premises in a clean and wholesome condition, or permit to be or remain upon such premises, any accumulation of manure, garbage, offal, rubbish, stagnant water of filthy or offensive matter of any kind, or any material which creates offensive or obnoxious odors or promotes fly breeding.

APPENDIX C.

Section 39.50(a), Municipal Code of the City of Los Angeles.

Sec. 39.50. Shows and Places of Assembly—Sanitation:

No person conducting, managing or operating any moving picture show or any theatre, dance hall, night club, circus, amusement park, or other place of public amusement or public assemblage shall fail, refuse or neglect to comply with the following requirements:

(a) The floors, walls, ceilings, doors, windows, stairways, hallways and every other part thereof shall be maintained in a good, clean, sanitary condition, and shall be painted or otherwise renovated whenever necessary.

APPENDIX D.

Section 39.50(b), Municipal Code of the City of Los Angeles.

Sec. 39.50. Shows and Places of Assembly—Sanitation.

No person conducting, managing or operating any moving picture show or any theatre, dance hall, night club, circus, amusement park, or other place of public amusement or public assemblage shall fail, refuse or neglect to comply with the following requirements:

(b) All rugs, carpets, or other floor coverings, tables, chairs, seats, counters, and all similar equipment shall be kept clean and in good repair.

APPENDIX E.

Section 57.10.02, Municipal Code of the City of Los Angeles.

Sec. 57.10.02. Obstruction of Exits:

No person shall erect, construct, reconstruct, install, alter or maintain any door, gate, partition, or similar obstruction in any passageway required as a means of egress from any portion of any building, or any public corridor or public stairway of any building, except a door or gate which can be removed or opened from the inside within 30 seconds without use of a key, tool or other implement or special knowledge.

APPENDIX F.

Section 57.10.23(a), Municipal Code of the City of Los Angeles.

Sec. 57.10.23. Exit and Directional Signs:

Every person owning or managing any building where people live, work or gather other than a dwelling shall provide exit and directional signs as hereinafter specified.

A. Type—Unless otherwise clearly and unmistakenly indicated as an exit, every exit door serving as a way of egress shall have placed over or adjacent thereto a sign bearing the word "EXIT" in letters not less than five inches high.

APPENDIX G.

Section 57.04.03, Municipal Code of the City of Los Angeles.

Sec. 57.04.03. Permits Required:

No person, without a valid Permit then in effect so to do: . . . [shall] establish, operate, maintain a theatre, motion picture theatre, and place of assemblage.

APPENDIX H.

Section 11.00(m), Municipal Code of the City of Los Angeles.

Sec. 11.00(m). Violations of this Code a Misdemeanor.

It shall be unlawful for any person to violate any provision or fail to comply with any of the requirements of this Code. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code, shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisions of this Code, unless provision is otherwise herein made, shall be punishable by fine of not more than $500.00 or by imprisonment in the City Jail for a period of not more than six months, or by both such fine and imprisonment. Each such person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Code is committed, continued or permitted by such person, and shall be punishable accordingly.

In addition to the penalties hereinabove provided, any condition caused or permitted to exist in violation of any of the provisions of this Code shall be deemed a public nuisance and may be summarily abated as such by the City. Each day that such a condition continues shall be deemed to be a new and separate offense.

APPENDIX I.

Section 19, California Penal Code.

§19. Punishment for misdemeanor; punishment not otherwise prescribed.

Except in cases where a different punishment is prescribed by any law of this State, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding six months, or by fine not exceeding five hundred dollars, or by both. (Stats. 1933, c. 848, p. 2216, sec. 1.)